Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

92-366

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORA ANN RUWITCH, Trustee,
Irrevocable Trust Agreement of
WALLACE R. RUWITCH,
Petitioner,

vs.

WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT S. ALLEN
RICHARD A. AHRENS
RONALD A. NORWOOD
LEWIS, RICE & FINGERSH
611 Olive Street, Suite 1400
St. Louis, Missouri 63101
(314) 444-7600

Attorneys for Flora Ann Ruwitch

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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QUESTIONS PRESENTED

1. Did the Court of Appeals abdicate its duty under *Erie* and *Salve Regina* to apply the whole body of applicable substantive law in its *de novo* review of a state law question — including the state law applicable to the construction of insurance contracts — when it held that under Missouri law an insured applying for a life insurance policy containing a "good health clause" warrants the state of his health, when representations regarding the insured's health were only made on the best of the insured's "knowledge and belief," and the policy that issued expressly provided such statements are "representations and not warranties", and in light of the fundamental rules of Missouri law that conflicts in policy language must be resolved in favor of the insured and in accordance with the reasonable expectation of the insured?

2. Did the Court of Appeals err in holding under Missouri law, contrary to well-established Missouri precedent and the holding of the Court of Appeals for the Eleventh Circuit applying identical principles of Florida law to an identical policy issued by this same insurer, that the insurer can avoid paying benefits when there is no evidence that the statements in the application as to the insured's health were false?

LIST OF PARTIES

Petitioner before this Court is Flora Ann Ruwitch. Respondent is William Penn Life Assurance Company of America.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Flora Ann Ruwitch respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 1, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 966 F.2d 1235, and the slip opinion is reprinted at Appendix (App. A-1). The Order of the United States Court of Appeals for the Eighth Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at Appendix (App. A-8).

The Court of Appeals reversed outright a judgment of the United States District Court for the Eastern District of Missouri entered pursuant to jury verdict on April 9, 1991. That judgment is reprinted in the Appendix (App. A-9). The Order of the District Court dated July 26, 1991 denying Respondent's motion for judgment notwithstanding the verdict and for a new trial is also reprinted in the Appendix (App. A-10).

JURISDICTION

On June 1, 1992, the United States Court of Appeals for the Eighth Circuit entered its Order reversing outright the District Court's prior judgment in favor of Petitioner. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on June 9, 1992. On July 7, 1992, the Court of Appeals denied both the Petition for Rehearing and the Request for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 7, 1990, Petitioner's husband, Wallace R. Ruwitch, died of colon cancer. At the time of his death, Mr. Ruwitch was 50 years old and had in force a two million dollar life insurance policy issued and delivered by Respondent William Penn Life Assurance Company of America on May 25, 1989. This term policy was purchased in connection with the acquisition of a business by Mr. Ruwitch in March of 1989.

On March 7, 1989 when Mr. Ruwitch applied for the policy, he appeared to be in excellent health. An extensive physical examination performed by a doctor selected by Respondent confirmed this fact.

After Mr. Ruwitch died, petitioner Flora Ann Ruwitch, his widow, made a proper claim for the policy proceeds. Her claim was denied by the Respondent. On July 9, 1990, Respondent filed a declaratory judgment action in the District Court, seeking

to avoid its obligation to pay the policy proceeds. Petitioner filed suit in a Missouri state court to collect the policy proceeds. After Respondent removed Petitioner's action to the District Court, the actions were consolidated for trial.[1] It is undisputed that the terms of this policy were to be construed in accordance with the laws of the State of Missouri.

On April 9, 1991, a jury in the District Court found for Petitioner and rejected the misrepresentation defense asserted by Respondent. The evidence at trial was undisputed that Mr. Ruwitch truthfully answered the question in the application regarding the existence of cancer because he had no knowledge of his colon cancer at the time he applied for coverage or at the time the policy was delivered. There was no evidence that Mr. Ruwitch had made a false representation or lied in stating that to "the best of his knowledge," he did not have cancer. It was undisputed that his cancer was diagnosed for the first time on June 20, 1989, after the policy had been issued and delivered.

It was also undisputed that this type of tumor was a "silent one", but one whose malignancy was very aggressive and spread rapidly to other parts of Mr. Ruwitch's body. The best treatment available, including his hospitalization at the Mayo Clinic and the M.D. Anderson Cancer Hospital, could not prevent the untimely death of Mr. Ruwitch.

Prior to trial, Respondent raised another claimed defense that Petitioner was also barred from recovery because of what Respondent termed a "good health clause" contained in the policy application. Respondent contended that the clause was applicable even though Mr. Ruwitch was not aware of his cancer. This clause provided that:

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[1] The jurisdiction of the District Court was based upon diversity of citizenship pursuant to 28 U.S.C. §1332.

> [N]o insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability *represented* in Parts I and II of this application. (Emphasis added).

The policy application consisted of two parts. Part I dealt with various vital statistics regarding Mr. Ruwitch. Part II consisted of a medical questionnaire and a medical examination to be completed by a physician selected by Respondent. In completing Part II of the application for this insurance, Mr. Ruwitch represented to Respondent's doctor that to the "best of his knowledge and belief," he did not have the various maladies listed in the questionnaire, including cancer. More specifically, Part I of the application contained the following provision regarding the nature and extent of Mr. Ruwitch's representations:

> The statements contained here and in Part II of this application and any supplement thereto, copies of which shall be attached to and made a part of any policy to be issued, are true to the *best of my knowledge and belief* and are made to induce the Company to issue an insurance policy. (Emphasis added).

The same "knowledge and belief" qualifier was contained in Part II of the application.

The final policy that was issued by Respondent expressly advised the insured that "[s]tatements in the application will be considered representations and not warranties."

Both sides had moved for summary judgment. The District Court (the Honorable George F. Gunn, Jr., a former justice of the Supreme Court of Missouri) overruled these motions.

After a five day trial, the case was submitted to the jury on Respondent's misrepresentation defense based upon its contention that in a final May 1, 1989, renewal application Mr. Ruwitch failed to disclose his last annual physical. Because Respondent adduced no evidence that Mr. Ruwitch had knowledge of his cancer or that any of his representations about his health were false, Judge Gunn refused to submit Respondent's so-called "good health" defense to the jury.

The jury rejected Respondent's misrepresentation defense and returned a verdict finding that Petitioner was entitled to recover the life insurance proceeds in the sum of $2,000,000, plus interest. Judge Gunn overruled Respondent's post-trial motions, which relied primarily on the trial court's refusal to enter judgment in Respondent's favor as a matter of law.

The Court of Appeals, in a terse seven page opinion, reversed Judge Gunn outright and remanded for entry of judgment in favor of Respondent. Recognizing the rule of *Salve Regina College v. Russell*, __ U.S. __, 111 S.Ct. 1217 (1991), it undertook its own analysis of Missouri law on a *de novo* basis. It stated that "Missouri courts recognize and enforce good health clauses in insurance contracts"; it then proceeded to construe this "good health" clause as an absolute one and held that even though the insured had no knowledge of his cancer, Respondent was entitled to judgment as a matter of law.

It cited the applicable provision of the policy and ruled (correctly) that "designation of the good health clause in this contract as either a warranty or a condition precedent" makes no difference (App., A-6), but then ignored the impact of the no warranty provision, the fact that this good health clause was based upon what the insured "represented" about his health, and that these representations were expressly based only on his "knowledge and belief." Ultimately, the Court held that the "good health" clause was in fact a warranty because "to construe the good health clause otherwise would render it superfluous."

(App., A-7). In doing so, the Court failed to cite, distinguish, or consider objectively the cited Missouri cases which hold that where there are conflicting clauses in a policy, all doubts must be resolved in favor of the insured, not the insurer.

Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied.

REASONS FOR GRANTING THE WRIT

I. THE OUTRIGHT REVERSAL BY THE COURT OF APPEALS WAS A PATENTLY IMPROPER APPLICATION OF THE GOVERNING MISSOURI LAW.

The first and fundamental reason for granting the writ is that the decision of the Court of Appeals is egregiously in error, with devastating effect on this individual Petitioner. She has been deprived of insurance on her late husband's life, without justification, when she is entitled to that insurance under well-established principles of Missouri law. The Eighth Circuit panel, consisting of three judges from states other than Missouri, reversed outright the judgment below and directed Judge Gunn to enter judgment in favor of Respondent. In so doing, the Court of Appeals obliterated well-established Missouri rules applicable to cases involving insurance clauses like those contained in this policy. It ignored and misapplied the time-honored rule of construction established in Missouri and by this Court that any ambiguity in a life insurance policy must be construed against the insurer. Indeed, the Court of Appeals in its Opinion established a new rule of construction that such doubts should be resolved in favor of the insurer.

The Opinion is simply wrong. The Court made a fundamental error in misconstruing and misapplying the language of the policy which expressly provided that representations in the application concerning the health of Mr. Ruwitch, including whether or not he had cancer, were made to the best of his "knowledge and belief," that Respondent promised in its policy that such statements in the application would be considered "representations and not warranties," and that the sound health clause relied upon was only based upon the actual state of insurability and health as so "represented" by Mr. Ruwitch in Respondent's application.

The Court cited and thus gave lip service to the relevant clauses in the policy. However, the Court of Appeals ignored the critical significance of the terms of the policy drafted by Respondent:

(1) The Court, after concluding that it made no difference whether a good health clause was treated as a warranty or condition (App., A-6), totally ignored the fact that this policy especially provided that the statements in the application, including the "no cancer" representation relied on by Respondent, were *not* to be considered as warranties. The Court in its outright reversal necessarily found that the "good health clause" operated as a warranty and that it was "breached" whether or not Mr. Ruwitch knew of his cancer.

(2)The policy expressly provided that the representations concerning the insured's health were only based on the insured's "knowledge and belief." Thus, all that was "represented" by Mr. Ruwitch in Respondent's "good health clause" was his state of mind. Therefore, for Respondent to successfully assert any good health clause defenses, it was compelled to prove falsity under both the Missouri and Federal case law, i.e., that Mr. Ruwitch somehow had knowledge of his cancer. He had no such knowledge. There was no such evidence. As a matter of law, his representations about his health were true.

(3)This "good health clause" was dependent upon a "representation" of the insured which in turn was expressly based upon his "knowledge and belief". Such a representation cannot be converted into a warranty. To be applicable, the clause required proof that what Mr. Ruwitch's representation was false. He had no such knowledge. There was no evidence that he did. There was no false statement as a matter of law as expressly required under Missouri law.

(4)Without any analysis, the Court simply jettisoned these critical provisions from the policy and determined Respondent's

unilateral "intent" based upon novel, but incorrect, rules of insurance policy construction — namely that any insurance policy should be construed in favor of the insurer, rather than the insured, and that the construction should favor enforcement of a forfeiture provision in a policy application that conflicts with express policy provisions. It did this when it erroneously held that to construe the "good health" clause as requiring proof of knowledge "would render it superfluous." (App., A-7). In fact, the Court's faulty logic necessarily renders "superfluous" the above cited policy provisions which were placed in the policy to protect the policyholder. The Court of Appeals has rendered those clauses illusory and legally ineffective.

That Court failed to recognize and apply the principle that an insurance policy, because it is a contract of adhesion, must be construed in light of the insured's reasonable expectations. Instead, the Court of Appeals adopted and applied new and unprecedented rules of life insurance construction— namely that an ambiguity must be resolved in favor of the insurer and that, in resolving conflicting policy provisions, a federal court should determine the unilateral intent of the insurer, rather than focusing upon the reasonable expectations of the insured, all with the design of upholding and enforcing life insurance policy forfeiture provisions.

II. THE COURT OF APPEALS FAILED TO APPLY MISSOURI LAW AS REQUIRED BY *ERIE RAILROAD V. TOMPKINS* AND IN ITS ATTEMPT TO PROVIDE *DE NOVO* REVIEW AS PRESCRIBED BY *SALVE REGINA* SO FAR DEPARTED FROM THE LANGUAGE OF THE POLICY AND MISSOURI LAW AS TO REQUIRE REVERSAL BY THIS COURT.

This Court should exercise its certiorari discretion and grant this Petition both to correct the outrageous decision below and to

clarify the role of federal courts of appeal in resolving questions of state law under the *Erie* doctrine in light of the standard of review established in *Salve Regina*. Distortion of controlling state law and state public policy, based upon a cursory review and narrow view of state law by a federal court, is not what this Court intended in *Salve Regina*, and is in clear violation of the *Erie* doctrine. *De novo* review has been used by the Eighth Circuit under the facts of this case as a license to create its own rules of life insurance policy construction— rules which contradict and subvert well-established Missouri law and Missouri public policy. To prevent its recurrence, to protect Petitioner and other Missouri life insureds from such injustice, and to redress the injustice done in the case at bar, this Petition for Certiorari should be granted.

This Court in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), expressly held that federal courts in diversity cases have the constitutional duty to correctly and fully apply the law of the State. The Court rejected the prior rule of *Swift v. Tyson* in order to prevent forum shopping in diversity cases and the discriminatory effect which *Swift* had upon resident plaintiffs. In expounding upon these concerns, the Court reasoned:

> [T]he mischievous results of the [*Swift*] doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. Swift v. Tyson introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law.

Id. at 74-75.

About one week after *Erie*, this Court in *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202 (1938), held that the principles of *Erie* applied with equal force to state law claims and defenses involving life insurance contracts. In reversing the judgment below in favor of the insurer, the Court held:

> Application of the "State law" to the present case, or any other controversy controlled by [*Erie*], does not present the disputants with duties that are difficult or strange. The parties and *the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts.*

Id. at 208-209. (Emphasis added). Here the Court of Appeals wholly failed to follow this clear mandate.

Likewise, in *Stoner v. New York Life Insurance Company*, 311 U.S. 464, 85 L.Ed.2d 284 (1940), the Court reviewed the Eighth Circuit's failure to apply the decisions of a Missouri appellate court that were clearly applicable to the dispute. In *Stoner*, an insurer instituted a declaratory judgment action, claiming that it was no longer obligated to make disability payments to the petitioner under insurance policies which it issued. The district court, following two state appellate court decisions which had construed the exact same policy language in similar suits between the parties, found that the petitioner was totally disabled within the meaning of the policy and rendered judgment for the insured. The Court of Appeals reversed the district court, holding that the evidence established, as a matter of law, that the insured was not totally disabled and remanded with instructions to enter judgment in favor of the insurer. *Id.* at 465-467.

In petitioning for certiorari, the insured argued, *inter alia*, that because the Eighth Circuit ignored clearly controlling decisions of the state appellate court "it is apparent that the [court of appeals] opinion below is not based on the law of the state but upon the 'general law'." *See* Summary of Argument of Petitioner, reprinted at 85 L.Ed.2d at 285.

This Court, relying upon *Erie*, granted certiorari, reversed the Eighth Circuit, and reinstated the judgment and findings of the district court. The Court stated:

> We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of [*Erie*], must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently.

Id. at 467.

This Court has granted certiorari in many other cases where a court of appeals has misapplied state law. *See, e.g., Guaranty Trust Company v. York*, 326 U.S. 99 (1945) and *Palmer v. Hoffman*, 318 U.S. 109 (1943).

There is also a recognized tradition in this Court of granting certiorari for the principal purpose of righting a grave injustice to an individual litigant, particularly where the injustice emanates from a federal court's clear deviation from established precedent, be it binding federal or state law. This tradition is applicable in civil as well as criminal cases. *See, e.g., Massachusetts Mutual Life Insurance Company v. Ludwig*, 426 U.S. 479 (1976); *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Montana v. Kennedy*, 366 U.S. 308 (1961). Exercise of certiorari for that purpose is also implicitly recognized by Supreme Court Rule 10.1(a).

In *Salve Regina College v. Russell*, __ U.S. __, 111 S.Ct. 1217 (1991), the Court held that the courts of appeals must determine state law questions in diversity cases *de novo*, that is, without reliance on the experience and wisdom of the District Court. *Salve Regina* has placed an added burden on the courts of appeals in diversity cases. The case at bar demonstrates how, without further guidance and clarification from this Court, the courts of appeal can go astray in discharging that duty.

Here, with almost casual dispatch, the Court of Appeals summarily reversed the District Court and issued a cryptic opinion, an opinion totally devoid of any true analysis of either the conflicting clauses put in the insurance policy by the Respondent or the Missouri case law applicable to such policy provisions. The Court of Appeals effectively turned Missouri law on its head by construing the language of the policy in favor of the insurer instead of the insured in contravention state law principles and public policy applicable to insurance policies.

A. The Court Failed to Apply Missouri Law Applicable to an Insurance Policy Which Contains Non-Warranty Language of the Kind Present in This Policy.

Missouri law is clear that in a policy such as this one, the non-warranty provision requires proof of a misrepresentation by the insured in order to void insurance coverage. In contravention of Missouri law and this expressed policy provision, the Court of Appeals held that Mr. Ruwitch warranted that the state of his health was as described in the application, thus completely negating the "representations and not warranties" language. In doing so, the Court totally misconstrued the policy language and did not apply the Missouri case law applicable to such provisions. This Court should not allow such a distortion of Missouri law to stand. Nor should it allow this gross injustice to the Petitioner and blatant violation of the *Erie* doctrine to remain unredressed.

In *Houston v. Metropolitan Life Insurance Company*, 97 S.W.2d 856 (Mo. App. 1936), the insured died of cancer. The insured represented in the policy application that she had never had cancer. After the policy was issued, the insured died of cancer. The insurer failed to prove that the insured had knowledge of her cancer.

The insurance policy contained the following provision: "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties." *Id.* 857. The court rejected the insurer's claim that the insured's knowledge was irrelevant, and enforced the policy in favor of the insured. In light of the no warranty provision, the court stated:

> So, in *Pacific Mutual Life Insurance Co. v Glaser*, 245 Mo. 377, 150 S.W. 549, 45 L.R.A. (N.S.) 222, relied upon by defendant, the application expressly warranted that all statements and answers made in the application were complete, true, and correct, and that if any such statement or answer was incomplete, untrue, or incorrect, no valid claim could arise under the policy on account of the death of the insured. *There is no such warranty in the application or policy here in suit.* On the contrary, the policy provides that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

Id. at 859. (Emphasis added).

On rehearing, the court reemphasized the importance of this "no warranty" policy provision by holding:

> It is true, as urged by defendant, that the application in this case contains a clause to the effect that the statements in the application shall form the basis of the contract of insurance, but not withstanding this clause, *the statements, under the express provision of the policy, in the absence of fraud, must be deemed representations and not warranties. So they must be treated as representations and must be disposed of under the law applicable to representations. So treating them, they are ineffectual to avoid the policy unless fraudulently made.* It is important to observe that the language of the policy is not merely that the statements shall not be deemed warranties, but the language goes further and affirmatively declares that the statements shall be deemed

> representations. *By what rule of construction then may this court convert such statements into warranties or conditions avoiding the policy*?

Id. at 862. (Emphasis added).

The Missouri Court of Appeals reaffirmed the *Houston* holding in *Cohen v. Metropolitan Life Insurance Company*, 444 S.W.2d 498 (Mo. App. 1969). In *Cohen*, the policy contained a no warranty provision identical to the one in the instant policy. It expressly provided that: "All statements made by the insured in the application for this policy shall be deemed representations and not warranties." *Id.* at 503.

The *Cohen* Court ruled that the insurer was required to prove knowledge. Relying on *Houston*, the Court held:

> The defendant insurance company in our case expressly framed General Provision No. 8 in the insurance policy in no uncertain terms that the statements in the application shall be representations and not warranties. We rule that the statements of the plaintiff in her application to be representations and not warranties.

Id. at 504. *See also Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135, 139 (Mo. App. 1942).

The Court of Appeals ignored the applicable policy language referred to above, cited only the Missouri cases which enforce absolute good health clauses, and then held, as a matter of law, that the "good health" clause in this policy barred Petitioner's recovery, even though there was absolutely no evidence that the insured had knowledge of his cancer or that Mr. Ruwitch made any false statement in the insurance application. In so doing, it totally ignored the Missouri cases construing policies with non-warranty language as requiring proof of *scienter*, and requiring that representations made pursuant to such policies must

be treated as representations and disposed of under the Missouri case law applicable to representations.

The Court of Appeals found that under Missouri law, it makes no difference whether the good health clause is designated as a warranty or a condition. (App., A-6). This is a correct statement of Missouri law only to the limited extent that, as reflected by the cases cited in the Court's opinion, Missouri courts regard conditions precedent and warranties as equivalent in their analysis of the effect of forfeiture provision in life insurance contracts. However, the Court ignored an entirely distinct class of statements in insurance applications—representations. This category is the class into which the statements in this application fall, by the express terms the policy that was issued and delivered by Respondent. Under Missouri law, representations as to good health are grounds for avoidance by the insurer only if they are knowingly false.

The Court of Appeals totally disregarded the policy provision that statements about the insured's health would only be regarded as representations and not as warranties. It reasoned that to give that clause meaning would make the good health clause "superfluous" notwithstanding the fact that this finding necessarily renders the "representations, not warranties" provision superfluous for the sole purpose of saving the "good health" clause from perceived superfluity. (App., A-7).

B. The Court Also Violated *Erie* When It Converted a Policy Representation Based Upon "Knowledge and Belief" into a Warranty

This "good health" clause was not an absolute one. Where there is a true good health clause, an insured's statement denying the existence of an existing disease is a "false statement," even when innocently made. Here the express "knowledge and belief" qualification to the statement of Mr. Ruwitch about his health expressly shifted the focus in determining the truth or

falsity to his state of mind. In this policy it was incumbent upon Respondent to prove that Mr. Ruwitch made representations about his health which were contrary to his "knowledge and belief"; that is, that he lied. In the absence of such a false statement by the insured, a good health clause does *not*, in *this policy*, result in the forfeiture of insurance coverage.

It is well-established under Missouri law that a suit for rescission of an insurance policy requires proof that the answers in the application are false in fact. In *Dixon v. Business Men's Assurance Company*, 365 Mo. 580, 285 S.W.2d 619 (1955), the Missouri Supreme Court expressly noted how this falsity requirement applies, even to policies containing *true* good health clauses:

> The rule in this state, as we understand it, is that where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy, then the representations, *if in fact untrue*, will avoid the policy, though the representations were innocently made.

Id. at 625. (Emphasis added). *See also Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135, 139 (Mo. App. 1942) ("We will first determine the nature of the insured's declaration... for if it was a warranty the defendant carried only the burden of showing the falsity of the statement, [citation omitted], while if it was a mere representation the burden rested upon defendant to show, not only that the statement was false, but that it was material to the risk and made wilfully and in bad faith with intent to deceive the insurer").

In *New York Life Insurance Company v. Calhoun*, 97 F.2d 896 (8th Cir. 1938), the Eighth Circuit, applying Missouri law, noted:

> The determining issue in this case is whether or not the insured's answers to the questions in the application were false. Appellant and appellee differ as to whether an innocent misrepresentation will, under Missouri law, void the policy. But it is not disputed that the representation upon which a suit for rescission is based must be false in fact... The burden was upon the company to establish the falsity of the statements in the application by clear and convincing evidence.

Id. at 898.

This falsity requirement is in fact a part of the Missouri Approved Jury Instructions, "M.A.I. 32.20," applicable to insurance policies where an insured's statements are construed as conditions or warranties. *See* item "Second", App. A-11.

Consequently, in determining the applicability of any "good health" clause, the Court was required under Missouri law to determine whether Mr. Ruwitch's statements regarding his health were false. In this case, Mr. Ruwitch merely "represented" that to the "best of his knowledge and belief" he did not have cancer. This statement was true in every respect. Thus, Respondent offered no evidence to justify the submission of its "good health" defense because it did not establish that his representation was false.

The courts have so interpreted such knowledge and belief applications and have required proof of knowledge. *See, e.g.*, *Bohm v. Fidelity and Casualty Company of New York*, 399 S.W.2d 450, 453 (Mo.App. 1966) ("At the time of applying he was not asked whether he was in sound condition or whether he had any mental or physical defect. The questions put to him related to his knowledge and belief and accordingly, . . ., the real query should have been, what was his state of mind at the time?"); *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359, 1363 (11th Cir. 1990) (In construing this same Penn Life

policy language, the Court held that the innocent statements made on the applicants' knowledge and belief rendered the answers "truthful and accurate"); and *Skinner v. Aetna Life and Casualty*, 804 F.2d 148, 150 (D.C. Cir. 1986) ("In the case before us, [the insurer] chose to include language in its group insurance form that had the effect of shifting the focus, *in a determination of the truth or falsity of an applicant's statement*, from an inquiry into whether the facts asserted were true to whether, on the basis of what he knew, the applicant believed them to be true"). *See also American Family Life Insurance v. Reeves*, 455 S.W.2d 932 (Ark. 1970); *Dean v. Nationwide Life Insurance Company*, 536 P.2d 1122 (Idaho 1975); and *Lentz v. Prudential Insurance Company of America*, 520 P.2d 769 (Mont. 1974).

In reversing the District Court, the Court of Appeals' Opinion ignored this requirement of falsity, in contravention of well-established Missouri precedent as required under the *Erie* doctrine. The opinion does not even mention the word falsity or deal with the concept where the good health representation is based upon the insured's "knowledge and belief".

Erie requires a federal court sitting in a diversity case to apply the "entire body of substantive law" in resolving this dispute, including the element of falsity required for the successful assertion of any "good health" affirmative defense. *See Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 208-209 (1938). The Court of Appeals instead relied upon a line of Missouri cases applicable only to pure good health clauses, none of which involve or discuss all of the relevant clauses contained in this policy. The cases relied upon by the Court of Appeals simply do not address the well-rooted state law principles of life insurance policy construction and well-established rules regarding the element of falsity which must be proven in order to successfully prevail on this affirmative defense under Missouri law. A federal court of appeals may not, under the rubric of *de novo* review, ignore state law requirements regarding the sub-

mission of affirmative defenses by creating its own *ad hoc* rules of policy construction which have absolutely no foundation or support in state law.

C. The Court Failed to Follow the Well-Established Missouri Rules of Construction That a Life Insurance Policy Should be Construed Strictly Against the Insurer and Liberally in Favor of the Insured, and That Such Policies Should Be Construed Based Upon the Insured's Reasonable Expectations.

By focusing on and only giving legal effect to the policy language which favors the enforcement of what it construed to be a "good health" warranty provision and the consequent forfeiture of life insurance coverage, the Court disregarded well-delineated principles of Missouri law applicable to the construction of insurance contracts in general and life insurance policies in particular: conflicts in language are to be resolved in favor of the insured; an insurance contract, deemed a contract of adhesion under Missouri law, must be construed to protect the reasonable expectation of the insured; and, most importantly, the harsh result of forfeiture should be avoided at all costs to protect the insured if the policy can be construed in any fashion favorable to the insured.

The Court in fact construed the policy in favor of the wrong party, Respondent. In deciding that the coverage under the Respondent's policy was forfeited, the Court construed its "good health" clause as an absolute one, a warranty of good health. It held that it made no difference whether this policy language is treated as a warranty or a condition, but then ignored the fact that the policy itself provided that there was no warranty, that the insured's statements were based upon the best of the insured's knowledge and belief, and that the good health clause was itself based upon what was "represented". At the very least, the conflicting language is ambiguous.

Missouri courts hold that in life insurance cases involving a conflict in policy terms, where the policy is subject to different interpretations, the court *must* interpret the policy in a fashion that will not result in a forfeiture of coverage. In *Cohen v. Metropolitan Life Insurance Company*, 444 S.W.2d 498 (Mo. App. 1969), the court set forth this well-established principle of insurance contractual construction as follows:

> In the law of insurance the courts do not favor warranties. If there is doubt they lean against a construction of a statement by an insured or applicant as a warranty and unless it is clearly shown by the form of the contract to have been *intended by both parties to be a warranty*, to be strictly and literally complied with, it will be held to be a representation.

Id at 504. (Emphasis added).

In *Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135 (Mo. App. 1942), the court noted:

> In determining whether a statement of the insured, contained in the original application for the policy or in an application for reinstatement, is a warranty or a representation, we must bear in mind that courts are strongly inclined against forfeitures and will consider a statement a warranty only when it clearly appears that such was the intention of the contracting parties, for the doctrine of warranty is one of great rigor and frequently operates harshly upon the insured.

Id at 139.

In *Dyer v. Kansas City Life Insurance Company*, 188 S.W.2d 758, 760-761 (Mo. App. 1945), the court set forth the strong Missouri public policy reasons why such construction of insurance policies is required:

> The insurer has the opportunity to have the language of the contract selected with great care and deliberation by experts and legal advisers acting exclusively in its interest, and is responsible for any ambiguity found therein. . . . It is, therefore, well established that where the meaning of a policy provision is doubtful or susceptible of different constructions, the policy should be construed strictly against the insurer and liberally in favor of the insured.

These cases are in accord with the well-recognized principle of Missouri law that an insurance policy must be construed in favor of the insured. *See Bellamy v. Pacific Mutual Life Insurance Company*, 651 S.W.2d 490, 495 (Mo. banc 1983) ("An insurance contract reasonably susceptible of any interpretation favorable to the insured will be so construed in order to avoid a forfeiture"). Indeed these basic tenets of policy construction had been previously followed by the Eighth Circuit in construing Missouri law. *Hampton Foods, Inc. v. Aetna Casualty and Surety Company*, 787 F.2d 349, 351-352 (8th Cir. 1986).

Here, there is a direct conflict between Respondent's version of its "good health clause" and the no warranty and "knowledge and belief" provisions of its policy. Under this scenario, the policy is therefore clearly ambiguous and should have been interpreted in favor of Mrs. Ruwitch. *See Behr v. Blue Cross Hospital Service, Inc.*, 715 S.W.2d 251, 256 (Mo. banc 1986) ("If a contract promises something at one point and takes it away at another there is an ambiguity."); and *Howard v. Russell Stover Candies*, 649 F.2d 620, 623-624 (8th Cir. 1981).

More recently, the Missouri courts have held that in construing insurance contracts, deemed contracts of adhesion under Missouri law, a court must attempt to effectuate the reasonable expectations of the insured. This principle of insurance policy construction was recognized and applied in *Estrin Construction Company, Inc. v. Aetna Casualty and Surety Company*, 612 S.W.2d 413 (Mo. App. 1981), wherein the court reasoned:

> An insurance policy is a contract of a distinctive species. It is the instrument whereby one contractor transfers to the other contractor [with the means to allocate the loss] who agrees to assume the risk for a consideration. [Citation omitted]. It is also a contract of adhesion. [Citations omitted]. The basic purpose of contract law is to protect the reasonable expectations induced by the agreements. [Citation omitted]. Thus, whether assent to contract rests upon negotiation or only adherence, the rules of construction subserve to give effect — as nearly as possible — to the expectations which induced agreement. [Citation omitted]. In a negotiated contract, the words of agreement describe the terms of the bilateral assent and so — when stated unambiguously — are sufficient to disclose the reasonable expectation of the parties. [Citation omitted]. In a contract of adhesion, however, the terms are imposed by the proponent of the form: they are not expected to read or even if read, the adherent has choice only to conform. [Citations omitted]. The *assent* is resembled rather than actual. The printed words of contract alone, therefore, are not enough to disclose the expectations of the parties. The court must look for that purpose to the full circumstances of the transaction — whether the written words of the contract be ambiguous or unambiguous. [Citations omitted]. Our decisions understand that reality and give effect to the substance over the form of such an agreement.

Id. at 418-419.

This reasonable expectation of the insured test has been applied by the Missouri Supreme Court, as well as by federal courts applying Missouri law. *See, e.g., Rodriguez v. General Accident Insurance Company of America*, 808 S.W.2d 379, 381-382 (Mo. banc 1991)("If there is a conflict between a technical definition within a contract, and the meaning which would reasonably be understood by the average layman, a

layperson's definition will be applied unless it plainly appears that the technical meaning is intended"); *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695, 697 (Mo. banc 1982)(The Court describes the objective reasonable expectation doctrine as a "rule provid[ing] the objective reasonable expectations of adherents and beneficiaries to insurance contracts will be honored even though a thorough study of the policy provisions would have negated theses expectations"). *See also Atkins v. Hartford Casualty Insurance Company*, 801 F.2d 346, 348 (8th Cir. 1986); *Farmers & Merchants Insurance Company v. Mid-Century Insurance Company*, 752 F.Supp. 890, 893 (E.D. Mo. 1990).

These well-established principles of construction were established and applied by an early case decided by this Court, which is strikingly similar to this case. In *Moulor v. American Life Insurance Company*, 111 U.S. 335, 4 S.Ct. 466, 28 L.Ed. 447 (1884), the policy application contained language more favorable to the insurer in that the "good health" clause provided that statements therein were to be treated as a "warranty". However, the policy contained a provision that statements in the application would be treated as mere representations.

The Court, in attempting to reconcile these clearly inconsistent provisions, refused to permit the "good health" clause to operate as a warranty by holding:

> Taken together, it cannot be said that [the application and the policy] have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the Company intended to require and the insured intended to promise an exact, literal fulfillment of all of the declarations embodied in the application. It is true that the word "warranted" is in

> the application... *yet it is a fact, not without some significance, that the word was not carried forth into the policy, the terms of which control when there is a conflict between its provisions and those of the application.* The policy upon its face characterizes the statements of the insured as representations. Thus, we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt, as to the intention of the parties, must, according to the settled doctrines of the law of insurance, recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured against the obligations arising from a strict warranty.

Id. at 342-343. (Emphasis added). *See Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135, 139-140 (Mo.App. 1942) (Court adopts the reasoning in *Moulor* in its entirety).

The Opinion of the Court of Appeals is in direct conflict with these clear precedents and established Missouri public policy. Its finding that but for Respondent's construction, the "good health" clause would be "superfluous" is simply wrong and provides no basis for the Court of Appeals to rewrite the clause to comport with its assumptions about Respondent's unsubstantiated intent. Moreover, the Court, rather than focusing on the reasonable expectations of the insured, based its holding solely upon what it perceived was Respondent's intent in inserting the so-called good health provision into the policy, despite the fact that there was no parol evidence offered by Respondent on the issue of intent.

There is no evidence in the record regarding the origin of the "knowledge and belief" language, the purpose of the no warranty provision in the policy, or the reason why Respondent did not use

an absolute good health warranty in its application — a warranty which would have made it crystal clear to Mr. Ruwitch that the existence of any disease, known or unknown, would result in the forfeiture of life insurance coverage. The Court bypassed fundamental principles of insurance policy construction by accepting Respondent's present argument about its "intent", while ignoring what a prospective insured would expect when statements regarding health are made which the insurer expressly promised would be treated as representations made to the best of his knowledge and belief.

Analyzing the literal words of the clause, especially those by which Mr. Ruwitch only "represented" his health based upon his "knowledge and belief", shows that the clause is *not* superfluous. The clause is only *inapplicable* in *this* case because Respondent has *no* evidence whatsoever that the insured had knowledge of his cancer. If Respondent in some other case presented proof of such knowledge, it could rely upon the clause to avoid policy coverage. It simply did not have the evidence to justify the application of that clause under the fact of *this* case.

D. This Court should Grant Certiorari to Rectify This Egregious Wrong.

The combination of *Erie Railroad* and its progeny and the *de novo* review standard required by *Salve Regina* have imposed a heavy burden on the judges of the courts of appeal. This is particularly true of appellate judges who carry heavy dockets and are then required to decide unfamiliar rules of state law, without the benefit of reliance on experienced trial judges who are not only more familiar with the case, but also more knowledgeable of the state law.

We urge that this Court right the wrong which is clearly evidenced by the decision in this case. We suggest that this

Petition presents a case where this Court should exercise its supervisory power to correct the clear error below.

Alternatively, this Court in its review might choose to modify the rigid language of *Salve Regina* to permit the courts of appeal to accord some deference to rulings of the district courts. The Court might also choose to grant certiorari in order to set forth in greater detail than does existing law the procedure to be followed by courts of appeal in resolving state law questions in the context of *de novo* review. In particular, the appellate court should be required to address the full body of state law presented to it by the parties—including state law rules of construction and state public policy— as well as all colorable arguments presented by them. *Erie* demands and requires nothing less. Only in this fashion can it be insured that what happened here will not regularly recur: appellate judges, unfamiliar with a large complex body of state law in a specialized area, reaching a result directly inconsistent with established state law and fundamental state public policy.

III. THE OPINION OF THE COURT IS IN CONFLICT WITH A DECISION OF THE ELEVENTH CIRCUIT CONSTRUING THIS SAME POLICY

The Court of Appeals' decision directly conflicts with an Eleventh Circuit decision interpreting this very "knowledge and belief" qualification in the very same policy application used by Respondent here. In *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359 (11th Cir. 1990), an affiliate of Respondent instituted a Declaratory Judgment action seeking to void two life insurance policies of insureds who were ultimately determined to have AIDS. The insurer contended that it could avoid its policy obligations by relying on a Florida statute which permitted an insurer to void insurance coverage based upon a false statement without proof of knowledge.

The Court rejected the insurer's argument because the policy application, the same one present in the instant policy, provided that the insureds' representations were only made to the best of their knowledge and belief. The Court held that the innocent statements made to the best of the applicants' knowledge and belief rendered their responses "truthful and accurate". *Id.* at 1363.

In so holding, the Court reasoned:

> "In the case before us [the insurer] chose to include language in its group insurance form that had the effect of shifting the focus, *in a determination of the truth or falsity of an applicant's statement*, from an inquiry into whether the facts asserted were true to whether, on the basis of what he knew, the applicant believed them to be true. Thus, [the insured's] answer must be assessed in light of his actual knowledge and belief."

Id. at 1363 (Emphasis added) (Quoting from *Skinner v. Aetna Life and Casualty*, 804 F.2d 148, 150 (D.C. Cir. 1986)).

In justification of this result, the *Sands* Court noted the following:

> Had Penn Life intended to retain the ability to void the contract based upon any inaccuracy, it should not have used the "knowledge and belief" qualifying language. Such language would reasonably induce an insurance applicant to believe that they were covered under the policy if they answered the questions as to the best of their knowledge and the insurer subsequently issued the policy. To permit an insurer to rescind a policy containing "knowledge and belief" language due to an unknowing misstatement not only contravene the terms of the contract itself, but is unfair as well.

Id. at 1364, n.7.

We are aware that this Court does not usually grant certiorari to review a conflict among the Circuits regarding a different construction of state law. However, this Petition presents a conflict with dramatically opposite results and involving the very same policy issued by an affiliate of the Respondent. What is the public, including those who buy and sell insurance polices, to conclude when two federal courts come to completely different results, not just on a rule of law, but in issuing dramatically opposite constructions of the same material clause in the same insurance policy?

CONCLUSION

The decision of the Court of Appeals is shockingly wrong. A grave injustice has been committed. There is a recognized tradition in this Court of granting certiorari for the principal purpose of righting a grave injustice to an individual litigant, particularly where the injustice emanates from a federal court's failure to accord rights derived from state substantive law. Exercise of certiorari for that purpose is implicitly recognized by Supreme Court Rule 10.1(a).

A continuation of this tradition, and its application in the case at bar, will have an effect reaching far beyond righting the obvious injustice done to Mrs. Ruwitch. It will serve notice to the courts of appeal that in reviewing state law questions, they must take seriously this Court's admonition that they consider the entire body of applicable state law and reach decisions in accordance with binding state precedent and state public policy. Their knowledge that, in exercising their new, far-reaching power in ruling on state law questions, their fiat is not beyond control, and that they must answer not only to reason, but also in exceptional cases to the scrutiny of this Court, will only improve the administration of justice, to the benefit of many litigants in addition to Petitioner.

The writ should issue.

Respectfully submitted,

Robert S. Allen
Richard A. Ahrens
Ronald A. Norwood
LEWIS, RICE & FINGERSH
611 Olive Street, Suite 1400
St. Louis, Missouri 63101

Attorneys for Flora Ann Ruwitch

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2943

Flora Ann Ruwitch, Trustee,
Irrevocable Trust Agreement of
Wallace R. Ruwitch,
Appellee,

v.

William Penn Life Assurance Company of America,
Appellant.

William Penn Life Assurance Company of America,
Appellant,

v.

Flora Ann Ruwitch, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 12, 1992
Filed: June 1, 1992

Before WOLLMAN and MAGILL, Circuit Judges, and LONGSTAFF,* District Judge.

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* The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa, sitting by designation.

WOLLMAN, Circuit Judge.

William Penn Life Assurance Company (Penn Life) appeals from a judgment against it for breach of its contract to insure the life of Wallace R. Ruwitch. We reverse and remand with directions to enter judgment for Penn Life.

I.

In early 1989, Wallace R. Ruwitch decided to purchase a $2 million policy of insurance on his life in order to secure loans for his purchase of a new business, Dow Screw Products. After analyzing policies from several competing company, Ruwitch chose to purchase a policy from Penn Life. Ruwitch and Penn Life's agent completed an application for insurance, naming Dow Screw as the owner and beneficiary of the policy.

The application that Ruwitch filled out had two parts. Part I required Ruwitch to furnish information such as address, date of birth, and name of beneficiary. Part II required Ruwitch to furnish information about his past and present medical condition. Included was a question, to which Ruwitch answered "no," asking whether Ruwitch had ever had cancer. Each part contained a clause stating that the information supplied was true to the best of Ruwitch's knowledge and belief. Part I stated:

> The statement contained here and in Part II of this application and any supplements thereto, copies of which shall be attached to and made a part of any policy to be issued, are true to the best of my knowledge and belief and are made to induce the Company to issue an insurance policy.

Part II stated:

> The statements and answers are true to the best of my knowledge and belief and are made for the purpose of inducing the company to issue insurance on my life.

Both Part I and Part II were signed by Ruwitch. Part I also contained a "good health" or "sound health" clause stating:

> [N]o insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability represented in Parts I and II of this application.

In addition, the policy itself contained a clause which said that "[s]tatements in the application will be considered representations and not warranties."

A few days after filling out the application, Ruwitch underwent a physical examination performed by a physician hired by Penn Life. On April 6, Ruwitch's own physician furnished Penn Life medical information based on Ruwitch's April 1988 physical. Both physicians concluded that Ruwitch was in good health.

Penn Life issued a policy to Dow Screw on April 26, and Dow Screw in turn sent the first premium check to Penn Life.[1] Ruwitch then decided, for estate tax reasons, to apply instead for a policy naming his insurance trust as the policy's owner and beneficiary. He and Penn Life's agent completed a new application for insurance on May 1. This application was the same as the first, including a statement that Ruwitch's last physical examination had taken place in April of 1988. Penn Life relied on the information previously given by Ruwitch's phpsician and the company's physician in deciding whether to issue the life insurance policy. Ruwitch gave the agent a check for the first premium on May 1, and the policy was delivered to Ruwitch on May 25.

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[1] This first policy, though issued, was never delivered, and the premium check was returned to Dow Screw. Thus, the policy never took effect.

In the meantime, Ruwitch had undergone his annual physical on April 18, 1989. He did not list this physical on the May policy application. At this examination, Ruwitch's physician discovered blood in Ruwitch's stool.[2] Further examinations during May and June resulted in the discovery, on June 20, 1989, that Ruwitch had in incurable cancerous tumor in his colon. Ruwitch died of colon cancer in March of 1990. The evidence at trial showed that the tumor had been present since at least January of 1989.

After Ruwitch's death, Penn Life filed a declaratory judgment action in federal court seeking to have the policy declared void and unenforceable. Flora Ann Ruwitch, who is Ruwitch's widow and the trustee of the insurance trust, filed an action in state court on behalf of the trust claiming that Penn Life had breached the contract of insurance. Penn Life then removed the state action to federal court, and the two actions were consolidated for trial.

Penn Life asserted two defenses to payment of the policy. It asserted first that Ruwitch misrepresented in the application that he had never had cancer. It further asserted that the good health clause precluded the policy from ever going into effect, since Ruwitch was not actually in the state of health represented in the application, that is, the tumor was already present when the policy was delivered.

Penn Life moved for summary judgment and for a directed verdict based on the good health clause. The district court denied both motions. The court submitted the misrepresentation claim to the jury but refused to instruct the jury on Penn Life's good health clause defense. The jury found against Penn Life and returned a verdict for the amount of the policy. Penn Life then

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[2] The physician performed a screening test which analyzes a small sample of fecal material for "occult," or hidden, blood.

moved for judgment notwithstanding the verdict, again asserting the good health clause. The district court denied this motion, and Penn Life appeals.

II.

The standards for granting a motion for a directed verdict and for granting a motion for judgment notwithstanding the verdict are identical. *Bernoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316, 1319 (8th Cir. 1987). We must 1) consider the evidence in the light most favorable to the nonmoving party, 2) assume any conflicts in the evidence were resolved in favor of the nonmoving party, 3) assume as proved all facts the nonmoving party's evidence tended to prove, and 4) give the nonmoving party the benefit of all favorable inferences reasonably to be drawn from the evidence. *Western Am., Inc. v. Aetna Casualty & Sur. Co.*, 915 F.2d 1181, 1183 (8th Cir. 1990). We will take the issue from the jury "only if all the evidence favors the movant and is 'susceptible of no reasonable inferences sustaining the position of the nonmoving party.' " *Toombs v. Bell*, 828 F.2d 481, 484 (8th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988)).

Penn Life contends that when applied to the undisputed facts in this case, Missouri law compels the entry of judgment in its favor on its good health clause defense. The trustee, on the other hand, contends that the statements Ruwitch made in the application were representations, not warranties. Thus, she argues, the good health clause is a defense only if Ruwitch fraudulently made false statements in the application.

We review do novo a district court's determination of state law. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991). The parties agree that Missouri law controls.

Missouri courts recognize and enforce good health clauses in insurance contracts. *See, e.g., Kirk v. Metropolitan Life Ins. Co.*, 81 S.W.2d 333, 343 (Mo. 1935); *Mahn v. American Life &*

Accident Ins. Co., 390 S.W.2d 573, 575 (Mo. Ct. App. 1965); *Lipel v. General Life Ins. Co.*, 192 S.W.2d 871, 875, (Mo. Ct. App. 1946). We have recognized such clauses as well. *See Security Benefit Life Ins. Co. v. Jackson*, 318 F.2d 846, 850 (8th Cir. 1963) (applying Missouri law). Some of the decisions characterize such clauses as warranties, *see Kirk*, 81 S.W.2d at 343; *Toler v. Atlanta Life Ins. Co.*, 248 S.W.2d 53, 55 (Mo. Ct. App. 1952); others view a good health clause as a conditions precedent to the effectiveness of the insurance contract. *See Mahn*, 390 S.W.2d at 576; *Lipel*, 192 S.W.2d at 875. We do not believe that designation of the good health clause in this contract as either a warranty or as a condition precedent will make a difference in the outcome in our decision. As we read the Missouri cases, those which have characterized a sound health clause as being in the nature of a warranty would have reached the same result had they characterized the clause as a condition precedent.

Applying the standard of review set forth above, we conclude that judgment should be entered for Penn Life. The evidence relevant to the good health clause defense is not disputed. The cancerous tumor had been present in Ruwitch's body since at least January of 1989, well before Ruwitch applied for insurance. The policy was delivered to Ruwitch on May 25, 1989, and the first premium had already been paid. Ruwitch's death was directly caused by the cancer. Thus, Penn Life is entitled to judgment as a matter of law.

The trustee points to the provision in the policy that information in the application would be regarded as "representations, not warranties." She contends this means that unless Ruwitch knew he had cancer at the time of delivery of the policy, the policy became effective and Penn Life must pay the benefits. When the contract is read was a whole, however, it is clear that it was Penn Life's intent to make the effectiveness of the policy conditional on the delivery of the policy while Ruwitch was still alive and in

good health. To construe the good health clause otherwise would render it superfluous. As stated by the *Kirk* court, "[h]ad the insurer known that the applicant for insurance was afflicted with a disease that probably would, as it did, soon cause . . . death, it doubtless would not have issued the policy." *Kirk*, 81 S.W.2d at 343. Thus, it makes no difference whether Ruwitch knew he had cancer at the time the policy was delivered. *See Security Benefit*, 318 F.2d at 850. "[I]t is the fact that is at issue, and not the question of good or bad faith." *Lipel*, 192 S.W.2d at 875.

Accordingly, the judgment is reversed, and the case is remanded to the district court with instructions to enter judgment for Penn Life.[3]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[3] Because we find that Penn Life's good health clause defense is valid, we need not reach its other claims that the district court erred by refusing to instruct the jury on the good health defense and by instructing the jury that Penn Life had to prove Ruwitch had "actual intent to deceive" when he failed to disclose the April 1989 physical examination to the company.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2943EMSL

Flora Ann Ruwitch, Trustee,
Appellee,

vs.

William Penn Life Assurance Company of America,
Appellant.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Arnold and Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 7, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Nos. 90-1312C(6) &
90-1709C(6)

FLORA ANN RUWITCH, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Plaintiff,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Defendant.

JUDGMENT

This action was tried before the Court and a jury, Honorable George F. Gunn, Jr., District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

It is ORDERED and ADJUDGED that the plaintiff, Flora Ann Ruwitch, recover from the defendant, William Penn Life Assurance Co. of America, the sum of Two Million ($2,000,000.00) dollars on the insurance policy and the sum of One Hundred Ninety-Five Thousand Eight Hundred and Twenty Dollars and Eighty Cents ($195,820.80) for interest, with interest thereon at the rate of 6.26% per annum and costs.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
United States District Judge

Dated at St. Louis, Missouri
this 9th day of April, 1991.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 90-1709C(6)
Consolidated With
90-1312C(6)

FLORA ANN RUWITCH, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Plaintiff,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Defendant.

ORDER

Upon consideration of defendant William Penn Life Assurance Company of America's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial,

IT IS HEREBY ORDERED that defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial shall be and it is denied.

Dated this 26th day of July, 1991.

/s/ George F. Gunn, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

32.20 [1981 Revision] Affirmative Defenses—Life Insurance—Breach of Warranty

Your verdict must be for defendant if you believe:

First, decedent represented in the application for the policy that (*here insert the statement, such as "he had not previously had heart trouble"*), and

Second, the representation was false, and

Third, such (*here insert a description of the matter referred to in the application*) contributed to the death of decedent.

Notes on Use (1969 New)

Caution. This instruction is appropriate only "where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy." See Committee Comment which follows.

Committee Comment (1969 New)

Where an action is brought to recover benefits under a life insurance policy, two distinct defenses may be available to the insurer. Insurer may defend on breach of a condition warranted to be true, and it may defend on the basis of misrepresentation of a material fact. When the defense is breach of a condition warranted to be true, the insurer may avoid liability without showing that the insured was guilty of fraud because the policy is *conditioned* upon the truth of the warranty or representation. To the contrary, the element of fraud must be established and submitted when the defense is one of false representation where no such warranty or policy condition exists.

The rule has been explained in *Dixon v. Business Men's Assurance Co.*, 365 Mo. 580, 285 S.W.2d 619, 625 (1955) as follows:

> The rule in this state, as we understand it, is that where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy, then the representations, if in fact untrue, will avoid the policy, though the representations were innocently made. This is so because such is the contract. The insurer is entitled to stand on the contract as written, and the innocence of the insured in making the representations is a matter of no concern. But where there is no such warranty or provision in the policy a misrepresentation, in order to avoid the policy must have been fraudulently made. This is the rule applicable to contracts generally, and we see no reason why an exception should be made with respect to insurance contracts. . . .
>
> Defendant invokes the rule, announced in the decisions, that the statute, section 5732, R.S.1929, Mo.St.Ann. § 5732, p. 4373 [RSMo 1949, § 376.589, V.A.M.S.], providing that no misrepresentations made in obtaining or securing a policy of life insurance shall be deemed material, or render the policy void, under the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, applies alike to warranties and representations, and draws no distinction between innocent and fraudulent misrepresentations. We are unable to see how this rule helps defendant. Obviously, the statute does not disturb the law of insurance contracts except in that it avoids defenses founded on misrepresentations when the matter misrepresented does not contribute to the contingency or event on which the

> policy is to be come due and payable. The purpose of the statute is to aid, not to hinder, the insured—to limit, not to extend, the rights of the insurer. Houston v. Metropolitan Life Ins. Co., 232 Mo.App. 195, 205, 97 S.W.2d 856, 860 [(1936)].

A similar requirement applicable to accident and health policies is in Section 376.783.3, RSMo 1986 which requires that false statements in policy applications cannot bar recovery unless such statements are material to the hazard assumed, or the acceptance of the risk.